

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RANDY WASHINGTON	:	CIVIL ACTION
	:	NO. 98-2380
v.	:	
	:	RELATED CRIMINAL ACTION
UNITED STATES OF AMERICA	:	NO. 95-124-3

ORDER

AND NOW, this ____ day of October, 1998, upon consideration of defendant's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241(c)(3) (1994 & Supp. 1998),¹ IT IS HEREBY ORDERED that the petition is DENIED.²

¹ Washington's petition, though styled as a § 2241 petition, is properly characterized as a petition under 28 U.S.C. § 2255 (1994 & Supp. 1998). See Chambers v. United States, 106 F.3d 472, 472 (2d Cir. 1997) (finding that it is "common practice" for courts to evaluate prisoner petitions without regard for their label); Bennett v. Soto, 850 F.2d 161, 163 (3d Cir. 1988) (construing pro se prisoner petition "as having sought relief under the only statute available to him"). Washington claims, in reliance on United States v. James, 78 F.3d 851, 858 (3d Cir.), cert. denied, 117 S. Ct. 128 (1996) (holding that government must demonstrate, by a preponderance of the evidence, that the cocaine involved in an offense is crack for the sentencing guidelines enhancement for crack to apply), that his sentence was improperly enhanced for distribution of crack cocaine in the absence of evidence that the cocaine base he possessed was actually crack. As Washington's challenge is to the "sentence as imposed," rather than to the "sentence as executed by the prison and parole authorities," his petition must be brought under § 2255. United States v. Walker, 980 F. Supp. 144, 145 (E.D. Pa. 1997) (quoting Gomori v. Arnold, 533 F.2d 871, 875 (3d Cir.), cert. denied, 429 U.S. 851 (1976)) (holding that challenge to sentence based on James is appropriately brought under § 2255 and not §2241); see also United States v. Calloway, No.98-3402, 1998 WL 631980 (E.D. Pa. Aug. 28, 1998) (challenge to application of sentencing guidelines should be brought under § 2255); United States v. Angel, No. 98-1392, 1998 WL 181938 (E.D. Pa. April 15, 1998) (challenge to conviction and sentence should be brought under § 2255). Washington's case does not fit the "narrow" circumstances where the remedy afforded by § 2255 is "inadequate or ineffective." In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997) (finding § 2255 remedy "inadequate and ineffective" in narrow situation where change in statutory law may negate criminality of prisoner's conduct and allowing prisoner to bring § 2241 action).

² This is Washington's second petition under § 2255. His first petition, which raised several ineffective assistance of counsel claims, was denied by this court in orders dated June 12,

1997 and September 2, 1997. See United States v. Washington, No. 97-2371 (E.D. Pa. Sept. 2, 1997). The Third Circuit denied a certificate of appealability, under 28 U.S.C. § 2253(c), on June 25, 1998. See United States v. Washington, No. 97-1749 (3d Cir. June 25, 1998). Because Washington failed to present his arguments under James in his first petition under § 2255, those claims may not be presented in a subsequent petition unless Washington is able to obtain a certificate from the Court of Appeals certifying that his petition raises

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

§ 2255. This court may not entertain Washington's petition because he has not obtained a such a certificate from the Court of Appeals. See Walker, 980 F. Supp. at 146 ("permission to file a [second § 2255 petition] can only by granted by a court of appeals). It is unlikely that Washington will be able to obtain this certificate because the factual and legal underpinnings of his James argument were available when he filed his first petition under § 2255. Washington was sentenced on August 28, 1996, and he filed his first § 2255 petition on April 7, 1997, both well after James was decided on March 4, 1996.